

**BEFORE THE SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT
PANEL A**

FILED

IN RE: ALVIN D. CLAY, Respondent
Arkansas Bar ID#96075
CPC Docket No. 2008-085

DEC 07 2009

**LESLIE W. STEEN
CLERK**

FINDINGS AND ORDER

The formal charges of misconduct upon which this Findings and Order is based arose from information provided to the Committee by Renee Crater, of MCH Physical Therapy Clinic, in an Affidavit dated September 22, 2008. The information related to the representation of Sonya Whitaker, a patient of MCH Physical Clinic, by Respondent between 2003 and 2006.

Respondent was served with a formal complaint, supported by affidavit from Ms. Crater, during November 2008. Mr. Clay responded with a general denial, providing no factual explanation for any of the allegations made herein. After response was filed, the matter proceeded to ballot vote pursuant to the Arkansas Supreme Court Procedures Regulating Professional Conduct of Attorneys at Law. Following service of the ballot vote Findings and Order, Mr. Clay timely requested a public hearing before a different Panel of the Committee on Professional Conduct. A public, de novo hearing was conducted before Panel A on Friday, November 20, 2009. All members of Panel A were present for the hearing with exceptions of Member Jerry Pinson, who was replaced by Panel C member Kenneth Mourton, and Member Benton Smith, who was replaced by Panel D member Laura Partlow.

The information before the Committee reflected that Renee Crater is the principal of MCH Physical Therapy Clinic in Little Rock. Sonya Whitaker of Little Rock was treated for injuries received as a result of an accident in which she was involved on May 27, 2003. Alvin

Clay of Little Rock was her attorney in the matter. Ms. Whitaker signed an authorization on July 2003, which was then sent to the office of Alvin Clay, where he admittedly signed it and returned it to the MCH file. The form is a directive, stating it is a lien, from the patient to her attorney to pay her MCH account directly from any recovery he makes for her on her legal claim. Mr. Clay agreed in writing to adequately protect the claim of MCH in any settlement or recovery. On March 3, 2004, MCH sent Mr. Clay a request for prepayment of records by fax. Payment of the MCH records fee of \$9.25 was sent by check dated March 5, 2004.

Ms. Whitaker had a MCH account statement of \$2088. After settlement, Ms. Whitaker agreed to pay MCH \$1000 cash and to pay the remaining balance at \$25 per month; however, Ms. Whitaker made only one \$25 payment. A \$1063 balance was still owed on the account.

On October 30, 2006, an MCH employee contacted Safeco Insurance and was informed the Sonya Whitaker matter had been closed since May 22, 2006. MCH was notified that two checks were sent to Ms. Whitaker and Mr. Clay. An attempt was made to call Mr. Clay on October 30, 2006, but his number was disconnected.

On December 11, 2007, an MCH employee was notified by Safeco that the first check sent to Ms. Whitaker and Mr. Clay, issued August 2, 2005, included MCH's total charges of \$2088. Information obtained in response to a subpoena issued to Safeco Corporation, and presented during the hearing before Panel A, showed that on August 2, 2005, Safeco paid Ms. Whitaker's medical bills, totaling \$4,190.60. The check was made payable to Alvin Clay and Sonya Whitaker and was endorsed by both. The check was written solely for the medical bills and was written from Ms. Whitaker's Personal Injury Protection (PIP) coverage of her insurance policy. On August 9, 2005, Safeco made its final settlement payment of \$3,500, from her uninsured motorist coverage, to cover

Whitaker's general damages. The settlement check was made payable to Alvin Clay, attorney, and Sonya Whitaker, single person. Ms. Whitaker signed a release accepting those funds on or about August 19, 2005.

Mr. Clay presented Panel A with a copy of a cashier's check made payable to his client, Sonya Whitaker, in the amount of \$5,127.32. The check is dated August 19, 2005. Mr. Clay also presented the Panel with a Settlement Sheet demonstrating a gross settlement of \$7,690.60, which is the combined total of the PIP payment check and the general damages check. Mr. Clay explained that his contract was for him to receive one-third of the gross recovery as his attorney's fee. He did not have a copy of the contract with him. His attorney fee reflected on the Settlement Statement, which was undated and unsigned by his client, was \$2,563.28. When questioned, Mr. Clay acknowledged that Ms. Whitaker's check included the total of the medical bills in the amount of \$4,190.60. This meant basically that she received \$936.72 of her general damages settlement.

There was no notice to MCH, as required by the Rules of Professional Conduct, from Mr. Clay that the settlement proceeds were received, nor was payment sent by Mr. Clay to MCH as he agreed to do. Mr. Clay admitted these facts and averred that it was an oversight that he did not write the check to MCH. According to his testimony, he cautioned his client to pay the medical bills.

The Committee was also apprised of the information that a written request was made by the Office of Professional Conduct to Mr. Clay for information related to this matter and he failed to respond in any fashion before service of the formal disciplinary complaint. Mr. Clay explained that he believed all matters before the Office of Professional Conduct were tabled based on conversations he had with Mr. Ligon after an unrelated personal matter arose which Mr. Clay was having to deal with at length. Mr. Clay did provide the settlement sheet and copy of the cashier's check to Ms.

Whitaker shortly before the public hearing.

Upon consideration of the formal complaint and attached exhibit materials, the response to it, other matters before it, the testimony of Mr. Clay, and the Arkansas Rules of Professional Conduct, Panel A of the Arkansas Supreme Court Committee on Professional Conduct finds:

1. That the Office of Professional Conduct withdrew the allegation of Rule 1.2(a) at the beginning of the public hearing.

2. By a unanimous vote, that Mr. Clay's conduct violated Rule 1.15(a)(5), when on July 17, 2003, Ms. Whitaker signed an authorization, in the nature of an assignment of benefits, directing him to pay MCH directly from any recovery obtained for Ms. Whitaker. Mr. Clay signed this document on July 28, 2003, and returned it to MCH. He later obtained Ms. Whitaker's treatment records and the \$2088 MCH billing on her account from MCH and used this information in his representation of Whitaker to obtain settlement, but never paid MCH \$2088 as agreed. Rule 1.15(a)(5) requires that upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full written accounting regarding such property to the client or third persons.

3. By a unanimous vote, that Mr. Clay's conduct violated Rule 1.15(b), when he failed to promptly notify MCH Physical Therapy Clinic in August 2005 that he received funds in the Sonya Whitaker settlement, funds in which MCH had an interest by virtue of the written assignment of benefits by Ms. Whitaker, which Mr. Clay had also signed, and when he failed to promptly deliver to MCH Physical Therapy Clinic funds received from the Sonya Whitaker settlement in which MCH had an interest by virtue of the written assignment of benefits by Ms. Whitaker, which Mr. Clay also

signed. Rule 1.15(b) requires that upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

4. By a 6 -1 vote, with Mr. Shults voting that a violation occurred, that Mr. Clay's conduct did not violate Rule 8.1(b) as alleged in the formal disciplinary complaint with CPC Docket No. 2008-085.

5. By a 6 -1 vote, with Ms. Partlow voting that a violation occurred, that Mr. Clay's conduct did not violate Rule 8.4(c) as alleged in the formal disciplinary complaint with CPC Docket No. 2008-085.

WHEREFORE, it is the decision and order of the Arkansas Supreme Court Committee on Professional Conduct, acting through its authorized Panel A, that ALVIN D. CLAY, Arkansas Bar ID#96075, be, and hereby is, REPRIMANDED for his conduct in this matter. Pursuant to Section 18. A. of the Procedures, Mr. Clay is assessed the costs of this proceeding in the amount of ONE HUNDRED TWENTY-FIVE DOLLARS (\$125), which is the standard costs and the appearance fee for the Court Reporter. In addition, Mr. Clay is ordered to pay restitution to the benefit of MCH Physical Therapy, pursuant to Section 18.C of the Procedures, in the amount of ONE THOUSAND SIXTY THREE DOLLARS (\$1,063). The restitution and costs assessed herein, totaling **\$1,188**, shall be payable by cashier's check or money order payable to the "Clerk, Arkansas Supreme Court"

delivered to the Office of Professional Conduct within thirty (30) days of the date this Findings and Order is filed of record with the Clerk of the Arkansas Supreme Court.

ARKANSAS SUPREME COURT COMMITTEE ON
PROFESSIONAL CONDUCT - PANEL A

By: Steven Shults
Steven Shults, Chair, Panel A

Date: December 7, 2009.